RECENT CASES.

AGENCY — APPOINTMENT BY INFANT — RATIFICATION. — *Held*, that the appointment of an agent by a minor, and a contract made by the agent under his appointment, are not void, but may be ratified by the principal on coming of age. *Coursolle* v. *Weyerhauser*, 72 N. W. Rep. 697 (Minn.).

The case is important as adding one more to a small but growing list of cases in which an infant's appointment of an ordinary agent is held merely voidable. *Whitney* v. *Dutch*, 14 Mass. 461; *Hardy* v. *Waters*, 38 Me. 450; *Pyle* v. *Craven*, 4 Littell, 17; *Hastings* v. *Dollarhide*, 24 Cal. 195. As the court frankly admits, nearly all the text-writers and a great many *dicta* in the cases state that an infant's appointment of an agent is entirely nugatory. This view apparently arose from a misconception of the old cases as to a power of attorney by an infant to appear and confess judgment, cases explicable as turning on a question of court procedure. Considering that this doctrine has obtained so long, it is remarkable that it seems to have been applied in almost no cases of ordinary agency, and in very few of a power of attorney under seal. *Lawrence* v. *McArter*, 10 Ohio, 37. The way, then, is fairly open to adopt a sounder view and to sweep away an illogical exception to the general rule now prevailing, that an infant's acts are not wholly void, but voidable at his option.

AGENCY — FELLOW-SERVANTS — PASSENGERS. — Plaintiff's husband was employed by defendant to repair a bridge, under a contract stipulating for free transportation over defendant's railroad between his home and his place of labor. While returning from his work, he was killed in a collision caused by the negligence of other servants of defendant. *Held*, at the time of the accident plaintiff's husband was not an employee, but a passenger. *McNulty* v. *Pa. R. R. Co.*, 38 Atl. Rep. 524 (Pa.).

O'Donnell v. *Allegheny Valley R. R. Co.*, 59 Pa. St. 239, is precisely in point, and was expressly followed. Outside of Pennsylvania, however, what authority there is seems to be the other way. *Gilshannon* v. *Stony Brook R. R. Co.*, 10 Cush. 228; *Vick* v. *N. Y. C. & H. R. R. R. Co.*, 95 N. Y. 267. Nevertheless, it is submitted that the Pennsylvania view is preferrable. The servant is doubtless carried because of his employment, but hardly as a part of it. He is at liberty to use any other method of transportation; and, indeed, the carriage may well be treated as part of the consideration paid for his services. The court very properly distinguished *Tanney* v. *Midland Ry. Co.*, L. R. 1 C. P. 291, and *Ryan* v. *Cumberland Valley R. R. Co.*, 23 Pa. St. 384, in which cases it was part of the employee's duty to travel in a construction train to such parts of the roadbed as might require repairing.

AGENCY — LIABILITY OF PRINCIPAL — FRAUD. — *Held*, that an action of deceit for fraud in the sale of land to plaintiff by defendant, through her agent, on the ground that false representations were made by the agent as to the quantity of the land, cannot be maintained, where the evidence fails to show that defendant knew of the representations. *Keefe* v. *Sholl*, 37 Atl. Rep. 116 (Pa.).

The case is contrary to the weight of authority and opposed to the principles of agency. Mechem on Agency, § 743. It is true, as a general proposition, that an action of deceit cannot be brought against one personally innocent of fraud. But the law of agency fixes upon the principal the responsibility for many acts of the agent which were not only unauthorized but even expressly prohibited. *Philadelphia & Reading Ry. Co.* v. *Derby*, 14 How. 468. The only question is whether the agent was acting within the scope of his authority. If he was, the law declares that the act of the agent is the act of the principal, and holds the latter liable civilly. It is hard to see how a distinction can properly be drawn between fraud and any other wrong. *Barwick* v. *Joint Stock Bank*, L. R. 2 Ex. 259. It is to be noticed that this is not like the case of *Cornfoot* v. *Fowke*, 6 M. & W. 358, where it was rightly held that an innocent representation by the agent could not be tacked to the guilty knowledge of the principal, so as to hold the latter liable in an action of deceit.

BILLS AND NOTES — AGENCY — UNDISCLOSED PRINCIPAL. — *Held*, that an undisclosed principal could sue in his own name on a note payable to his agent without alleging a transfer of the note to him by the agent. *McConnell* v. *East Point Land Co.*, 28 S. E. Rep. 80 (Ga.).

This decision is certainly not warranted by authority. The court states that the doctrine which allows an undisclosed principal to sue in his own name on contracts made in the name of his agent, applies to all contracts. The opinion overlooks the fact that the doctrine is generally held not to extend to sealed instruments and negotiable paper.

As a decision in the law of bills and notes the case is very unsatisfactory, as it breaks in upon the rule that the rights and liabilities attaching to a negotiable instrument should appear on its face. 1 Dan. Neg. Ins., 4th ed., § 303; 2 Ames's Cas. on Bills and Notes, 550, note 1, 558, note 1.

CONSTITUTIONAL LAW — CLASS LEGISLATION — UNJUST DISCRIMINATION. — *Held*, that a Pennsylvania statute imposing upon every employer of foreign-born, unnaturalized, male persons over twenty-one years of age, a tax of three cents a day for each day that every such person may be employed, and authorizing the deduction of that sum from the wages of the employee, is in violation of the Fourteenth Amendment. *Fraser* v. *McConway & Torley Co.*, 82 Fed. Rep. 257.

Held, that an act requiring persons peddling in a certain county to take out a local license, but exempting merchants, pedlars who sell to merchants, and citizens who sell the products of their own growth and manufacture, is in violation of the Fourteenth Amendment. *Comm.* v. *Snyder*, 38 Atl. Rep. 356 (Pa.).

Legislation which is directed towards a class is not for that reason unconstitutional. But it must have a just and reasonable basis; it must not provide for a mere capricious selection. *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356. In both the cases under consideration the court failed to find a reasonable basis, and both decisions seem proper. It is, perhaps, conceivable that a condition of affairs might arise in a State requiring such legislative regulations for the public welfare. Under such circumstances the question is one of the greatest delicacy. The determination of the existence of the exigency is primarily a legislative matter. If the court could not find that the legislature had acted unreasonably, the legislation should be sustained. *Powell* v. *Pennsylvania*, 127 U. S. 678. But where, as here, the court is satisfied that the legislature has acted arbitrarily, there is unjust discrimination, and the Fourteenth Amendment applies.

CONSTITUTIONAL LAW — RAILWAY RATES — REVIEW BY COURTS. — A statute provided for a railroad commission to regulate rates in the State. *Held*, that the fixing of rates is a legislative or administrative act, not a judicial one. The court can review the acts of the commission only so far as to determine whether the rates fixed by it are confiscatory. *Steenerson* v. *Great Northern Ry. Co.*, 72 N. W. Rep. 713 (Minn.).

The question presented by this case has given rise to much diversity of opinion. Where the reasonableness of rates has been passed upon by the legislature, the Supreme Court of the United States has held that it cannot review the question. *Budd* v. *New York*, 143 U. S. 517. The same court has held that where the rates have been determined by a commission its decision is reviewable. *Chicago Railway Co.* v. *Minnesota*, 134 U S. 418. It would seem that a distinction between rates settled by the legislature and those settled by a commission is untenable. What the legislature can do itself it can confer power on its duly authorized commission to do. Granting this, it is still necessary to bear in mind that there are in these cases two distinct inquiries, — one as to the reasonableness of the rates, the other as to the reasonableness of the action of the legislature. The former is not within the scope of the judiciary, the latter is. If the legislature has acted unjustly and capriciously, it has acted outside its jurisdiction. But within its jurisdiction its decision is final. The court cannot impose its personal standard upon the legislature. The function of the court in this connection may well be compared to that of the judge in revising the verdict of the jury. 1 Thayer's Cas. on Const. Law, 672, note.

CONTEMPT OF COURT — CRITICISM OF JUDGE. — The publication of newspaper articles reflecting on the character of a judge, without reference to any pending case, cannot be punished as a contempt of court. *State* v. *Circuit Court of Eau Claire County*, 72 N. W. Rep. 173 (Wis.). See NOTES.

CRIMINAL LAW — SPECIFIC INTENT — INTOXICATION. — *Held*, that intoxication, to reduce the crime of murder from the first to the second degree, must be such as to paralyze the faculties of the defendant and render him incapable of forming an intent to kill, and not merely such as to satisfy the jury that the intention did not in fact exist. *Wilson* v. *State*, 37 Atl. Rep. 954 (N. J.). Dissenting opinion, 38 Atl. Rep. 428.

The reasoning of the majority is founded upon a misconception of the law in cases of intoxication. The court correctly assumes that intoxication is not a defence in itself, but, probably for fear of opening too large a field for fraudulent defences, it fails to recognize the distinction between offences which require a specific intent and those which do not. Murder in the first degree is a wilful, deliberate, and premeditated killing; if, therefore, for any reason whatever, the specific intent to kill does not exist, the crime is not committed. The decision is supported by some loose language in the books. In *Warner* v. *State*, 56 N. J. Law, 86, the authority chiefly relied on, the

question is not involved, and where the point has come up squarely the courts have generally decided in accordance with the opinion of the dissenting judge. See *Haile* v. *State*, 11 Humph. 154.

DAMAGES — CONTRACTS — QUANTUM MERUIT. — The plaintiff, after part performance, was wrongfully prevented by the defendant from completing his contract. In a suit upon a *quantum meruit* it was *held* that the plaintiff might recover the fair and reasonable value of what he had done, without reference to the compensation fixed by the contract. *Thompson* v. *Gaffey*, 72 N. W. Rep. 314 (Neb.).

The weight of authority is probably in favor of this case. The basis of the doctrine is that the plaintiff should be allowed to recover that which he has advanced in the sole expectation of performance by the defendant. *Derby* v. *Johnson*, 21 Vt. 17; Keener on Quasi-Contracts, 298. On this view logical consistency would demand that the reasonable value of the part performed should be the measure of damages, even if it exceeded the contract price for the whole; but no court has gone so far. The doctrine of the principal case may, however, be open to doubt. The only question is as to the compensation, and where the parties have fixed a rate by agreement the law should not imply a different one. This is especially true as the plaintiff has the option of declaring on his express contract and recovering any prospective profits. See *Doolittle* v. *McCullough*, 12 Ohio St. 360.

EQUITY — BILL TO GET POSSESSION OF LAND. — *Held*, that a claimant under a homestead entry who has obtained his final certificate from the Land Department may not maintain a bill in equity to get possession of the land. *Laughlin* v. *Fariss*, 50 Pac. Rep. 254 (Okl.).

In the case of *Barnes* v. *Newton*, 48 Pac. Rep. 190 (Okl.), the Land Department had decided in favor of the plaintiff's entry, but he had not yet received his final certificate or begun residence on the land. The equity court took jurisdiction to give the plaintiff possession, on the ground that his remedy at law was too slow. As the United States statute requires a homestead entryman to begin residence on the land within six months of the date of his entry, a speedy remedy is especially desirable for him. Yet it may be doubted, as suggested in 11 HARVARD LAW REVIEW, 268, whether equitable interference is expedient even in that case, and the court is clearly wise in refusing to extend its jurisdiction to the principal case.

EQUITY — CIVIL SERVICE ACT — REMOVAL FROM OFFICE. — *Held*, that the rules which Congress authorizes the President to draw up to give effect to the Civil Service Act are simply executive regulations, without the force of law; and that therefore a court of equity cannot interfere in the removal of an official embraced under such rules. *Carr* v. *Gordon*, 82 Fed. Rep. 373. But *contra*, *Priddie* v. *Thompson*, 82 Fed. Rep. 186. See NOTES.

EQUITY — PARDON OF ACCUSED AFTER FORFEITURE OF BAIL BOND. — *Held*, that pardon of the accused after forfeiture of his bond does not relieve his sureties from liability. *Dale* v. *Commonwealth*, 42 S. W. Rep. 93 (Ky.).

This precise question is here raised for the first time in Kentucky. What little authority there is on the point is in accord. The legal liability of the so-called surety, who is in fact a principal debtor, is fixed by the forfeiture. The only question is whether the subsequent pardon gives ground for relief in equity. Admitting even that there would be none in case the obligee were an individual, the argument can be suggested that, where the obligee is the sovereign, he should not seek to enforce through his courts a civil liability connected with an offence which he has pardoned. But no sound distinction in this respect between the sovereign and an individual can well be drawn. The pardon relieves only against the penalties of the offence. Even to prevent hardship, equity cannot interfere with the enforcement of an established legal right, where no fault can be imputed to its possessor. See *Weatherwax* v. *State*, 17 Kan. 428; *State* v. *Davidson*, 20 Mo. 212.

EVIDENCE — INTENTION. — On a trial for murder, the prosecution had given evidence that the defendant had intended to flee from the State, after being informed of the death of the person for whose murder he was indicted. To rebut this, he offered in evidence a letter written by him explaining his intended departure. *Held*, it was inadmissible. *State* v. *Carrington*, 50 Pac. Rep. 526 (Utah).

The court failed to notice the rule laid down in *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, and *Railway Co.* v. *Herrick*, 49 Ohio St. 25, that intention, if material, can be proved by contemporaneous declarations. But to have brought the letter within this rule, it must first have been shown that it was not manufactured evidence. The circumstances of the writing of the letter were sufficiently suspicious to warrant the conclusion that it was for a self-serving purpose. On this view of the facts the decision is clearly correct.

EVIDENCE — RES GESTA. — In an action against a railroad company for causing the death of A, defendant tried to prove that A was stealing a ride on the train and fell off between the cars. To rebut this and to show that A was walking along the track at the time of the accident, plaintiff offered evidence that A had been kicked and shoved off another of defendant's trains which had preceded, by about an hour, the one by which A had been killed. *Held*, the trial court properly admitted this evidence as part of the *res gestæ*. "It is all a part of the history of the case." *Knoxville, etc. R. R. Co.* v. *Wyrick*, 42 S. W. Rep. 434 (Tenn.).

The case illustrates the great confusion in some courts as to the doctrine of *res gesta*. Properly (except in certain cases of agency, bankruptcy, and rape) it is an exception to the rule against hearsay, by which are admitted declarations accompanying acts which are in themselves admissible. *Waldele* v. *N. Y. C. & H. R. R. R. Co.*, 95 N. Y. 274. The present case is not one of hearsay at all. But the language of the court is even looser than the usual way of stating the scope of the doctrine. There is a reasonable limit to the phrase, "a part of the surrounding circumstances;" but the phrase, "a part of the history of the case," would do away with the whole rule against hearsay, for the evidence most objectionable on that score is, if material, a part of such history. The result, however, seems right. The real objection to the evidence is the lack of probative value. But the trial judge has, in the exercise of his discretion, admitted the evidence, and his decision should not be disturbed, except upon clearer proof of abuse of discretion than is here shown. *Amoskeag Mfg. Co.* v. *Head*, 59 N. H. 332.

EVIDENCE — SCIENTIFIC BOOKS — EXPERTS. — A witness may read in evidence excerpts from scientific books in support of his professional opinion. *Western Assurance Co.* v. *The J. H. Mohlman Co*, U. S. Circuit Court of Appeals, Second Circuit, Oct. 11, 1897 (not yet reported). See NOTES.

INSURANCE — TERMOR A TRUSTEE. — *Held*, insurance money collected by a tenant for life is held by him in trust either to rebuild or to enjoy the interest for his life and leave the principal for the remainder-man. *Green* v. *Green*, 27 S. E. Rep. 952 (S. C.). See NOTES.

INTERNATIONAL LAW — CHANGE OF SOVEREIGNTY — PRIVATE RIGHTS. — *Held*, that the law in New Mexico, determining the rights of property between husband and wife, is the law of Mexico as it was in force at the time when the territory was acquired by the United States. *Barnett* v. *Barnett*, 50 Pac. Rep. 337 (N. M.).

Law is territorial, and is changed, not by a mere change of sovereignty, but by act of the sovereign. When territory is ceded, the ceding sovereign may change the law at the time of transfer, *U. S.* v. *Kinkead*, 150 U. S. 483; or the new sovereign may change it by statute. But until a change is made the former law remains in force, except in so far as it is in conflict with the political character, institutions, and constitution of the new sovereign. *Chicago & Pacific R. R. Co.* v. *McGlinn*, 114 U. S. 542; *U. S.* v. *Percheman*, 7 Pet. 82.

MORTGAGES — RIGHT TO PURCHASE TAX TITLE. — Where a mortgagor sought to compel a reconveyance of the premises, *held*, that the mortgagee could set up a tax title based on tax sales made before he went into possession, which title had been conveyed to him. *McLaughlin* v. *Acom*, 50 Pac. Rep. 441 (Kan.).

The decision follows the weight of American authority. In England a tax title is unknown. See Jones on Mortgages, § 713, and cases cited. In them the following distinction is made: A mortgagee, if not in possession, is under no duty to pay taxes, and has the same right as a stranger to purchase a title based on them. If, however, he has taken possession he is under a duty to pay taxes, and hence cannot set up a title acquired under a sale made because of his default. For reimbursement he is given a lien in addition to the lien for his mortgage debt. But in *Maxfield* v. *Willey*, 46 Mich. 252, Cooley, J., allowed the mortgagor to treat such a title acquired by the mortgagee as valid or not at his option, on the principle that "neither party to a mortgage can, against the will of the other, buy at a tax sale and cut off the other's interest." This would seem the better doctrine. A mortgagee, whether by the mortgage he gets legal title or only a lien, is a fiduciary under obligation to return the security on payment of the debt. He cannot, therefore, compete with the mortgagor, and should not be permitted to put himself in a position where he can refuse to carry out his obligation.

PERSONS — CUSTODY OF CHILD. — In a *habeas corpus* proceeding to obtain the custody of an infant from its father, it appeared that the child's mother was dead and the father was morally unfit to have charge of it. The applicant for the writ was not a relative, but had cared for the child for several years, and desired to keep it. *Held*, the writ would not be quashed. *Schleuter* v. *Canasty*, 47 N. E. Rep. 825 (Ind.).

This case represents the modern law in regard to the custody of children. In England, at common law, the father's right was paramount and practically absolute. *Rex* v. *De Manneville*, 5 East, 221; *Rex* v. *Greenhill*, 4 A. & E. 624. Such great injustice frequently resulted from the application of the common-law doctrine, that it has been much modified by statute. See 36 & 37 Vict., c. 66. In America, even in the absence of statutes, the father has no absolute right to the custody of his child. He is *prima facie* entitled to the custody, but is in a fiduciary relation to the child, analogous to that of a trustee to the *cestui*. If he is unfit to perform the trust, and the welfare of the infant demands it, courts may, in their discretion, bestow the custody upon another. Hochheimer, Custody of Infants, 2d ed., sec. 40.

PRACTICE — DISCOVERY — "FISHING." — In a proceeding to quiet title to certain premises, defendants, who claimed to be owners thereof, were ordered, on interrogatories being filed for discovery, to produce everything which might tend to show that they were not owners to the extent which they claimed. Counsel for defendants stated that this would necessitate a search lasting about nine months, and extending through hundreds of years. The order was affirmed on appeal. *Attorney-General* v. *Newcastle-upon-Tyne Corporation* [1897] 2 Q. B. 384.

Discovery is now generally obtained by statutory interrogatories instead of a bill in equity; but this is merely a change in procedure. 1 Pom. Eq. Jur., 2d ed., § 209. The principal case allows "fishing" with serious consequences to the defendants. It follows the general English practice, however. See Wils. Jud. Acts, 6th ed., 251–268. For an explanation of the misconceptions from which this practice developed, see Langdell, Eq. Pl., 2d ed., 252–258. It is unsafe to generalize as to the American practice; but in New York (1 Barb. Ch. Pr. 101, note 3) and Massachusetts (*Wilson* v. *Webber*, 2 Gray, 558; *Davis* v. *Mills*, 163 Mass. 481), the practice appears to be more satisfactory. On principle a party is entitled to discovery in answer to specific affirmative charges and specific interrogatories as to matters relevant to the support of an affirmative or negative case. Even when the rule is clear as to the right to discovery, there is great difficulty in applying it. That the charges should be affirmative and specific is especially necessary to prevent "fishing," when discovery is sought in support of a negative case. The practice in regard to these matters depends mainly on the common sense of the individual judges.

PROPERTY — ATTACHMENT OF A SCHOLARSHIP. — A college conferred upon the defendant a perpetual scholarship entitling him to keep one scholar appointed by him at the institution. *Held*, that the right so conferred could not be attached and sold in execution of a judgment. *Cleveland National Bank* v. *Morrow*, 42 S. W. Rep. 200 (Tenn.). See NOTES.

PROPERTY — RIPARIAN RIGHTS — IMPROVEMENT BY STATE — COMPENSATION. — The city of New York, under authority from the State, built on the foreshore, owned by the State, an embankment, whereby it deprived the plaintiff, a riparian owner, of his riparian rights. *Held*, that he was entitled to no compensation, since the embankment was for the benefit of commerce and navigation. *Sage* v. *Mayor of New York*, 47 N. E. Rep. 1096 (N. Y.).

After a full review of the authorities, the court decides that, by the law of New York, ownership of property on navigable tide-waters is subject to a right impliedly reserved in the State to improve the water front for the benefit of commerce and navigation, without compensation to the owner. *Lansing* v. *Smith*, 9 Wend. 4; *Furman* v. *City of New York*, 5 Sandf. 16; s. c. 10 N. Y. 567; *Towle* v. *Remsen*, 70 N. Y. 303. If the improvement is for any other purpose, as for a railroad, there is no such implied reservation, and the owner is entitled to compensation. *Rumsey* v. *N. Y. & N. E. R. R. Co*, 133 N. Y. 79. If it is once admitted that riparian rights are property (*Yates* v. *Milwaukee*, 10 Wall. 497; *Buccleugh* v. *Board of Works*, L. R. 5 H. L. 418), this is the only possible ground on which to rest the New York rule. A similar limitation on complete ownership is found in *Peart* v. *Meeker*, 45 La. Ann. 421, and *Philadelphia* v. *Scott*, 81 Pa. St. 80.

PROPERTY — TITLE BY ESTOPPEL. — A, B, and C each owned one undivided third of a certain lot. A gave a deed, purporting to convey the premises to B, with warranty against all claims under the grantor. Later A acquired one-half of C's interest and deeded this to D. *Held*, that D was entitled to one-sixth of the lot as against B. *Bennett* v. *Davis*, 38 Atl. Rep. 372 (Me.).

The doctrine of the case is that a warranty in a deed against all claims under the grantor, where no intent is shown to transfer title to be acquired *in futuro*, relates only to claims originated by the grantor himself. Therefore he may later obtain an interest not created by himself and hold it against his grantee. Such was the interest in ques-

tion here, and hence there would be no estoppel even against A himself. This is probably good law and generally accepted. The case might, however, have been put on the ground that D, as a purchaser for value without notice, would not be affected by any estoppel, though good against A. The court seems to admit that this view is right on principle, though repudiated in several Maine cases. Whether this is sound law or not has been much disputed. Two questions are involved, — whether under the registry acts a grantee has constructive notice of a deed made by his grantor before receiving the title under which the grantee claims; and whether, if he has not, the doctrine of estoppel, really a fiction, is to prevail over the spirit of the registry laws. Rawle on Covenants, 5th ed., § 259 *et seq.*; Bigelow on Estoppel, 5th ed., 413 *et seq.*; *Salisbury etc. Society* v. *Cutting*, 50 Conn. 113, reporter's note.

SALES — PASSING OF TITLE — TENANCY IN COMMON. — The plaintiff sold to the defendant not less than 1600 nor more than 2300 bushels of corn at a certain price per bushel, and received $50 of the purchase-money. The corn was in two cribs, one containing 1600 bushels intact, and the other, which had been opened, about 700 bushels. The plaintiff reserved a right to retain 200 or 300 bushels, if he needed them, and a third party was entitled to 50 bushels. Before any corn had been separated from the mass the entire lot was burned. *Held*, that as to 1600 bushels, at least, title had passed to the defendant. *Welch* v. *Spier*, 72 N. W. Rep. 548 (Iowa).

The general rule is that when a contract is made for the sale of part of a specific mass, no title passes to the buyer until appropriation of a certain portion to that contract. *Campbell* v. *Mersey Dock, etc.*, 14 C. B. N. S. 412. But this is only a rule of presumption, and if it appears to be the intention of the parties that title should pass, it will pass. *Kimberly* v. *Patchin*, 19 N. Y. 330. In the principal case the facts seem to show such intention. As no particular grains of corn can be selected, there is no difficulty, in the nature of things, in holding the defendant a tenant in common as to the 1600 bushels. It has been strongly urged that the purchaser from the proprietor of a grain elevator, where the mass is constantly changing, is a tenant in common. 6 Am. Law Rev. 469. *A fortiori* the purchaser of a part from a specific mass would be. *Chapman* v. *Shepard*, 39 Conn. 413.

STATUTE OF LIMITATIONS — AMENDMENT OF DECLARATION. — In 1884 plaintiffs, though unincorporated, brought action as a corporation. Defendants did not plead *nul tiel corporation*. Plaintiffs got judgment and defendants appealed. In 1895, while the case was still pending in the courts, plaintiffs amended their declaration, substituting their own names as plaintiffs. *Held*, that defendants could then plead the Statute of Limitations in bar of the claim. *Beaty* v. *Atlantic, &c. R. R. Co.*, 28 S. W. Rep 32 (Ga.).

The court says that, as the defendants had failed to plead *nul tiel corporation*, they could not afterwards, while the declaration was in its original form, avail themselves of the fact that the party plaintiff was really non-existent. The running of the statute was of course stopped by the entry of suit so far as that action was concerned. But as soon as the declaration was amended, the defendants could at once say that the former proceedings were really void for want of a party plaintiff, and therefore of no effect to interrupt the running of the statute. Therefore action was barred. The reasoning seems entirely sound, but the result arrived at is curious. By making their declaration correct, when before it was in strictness false, the plaintiffs threw themselves out of court.

TORTS — ALLUREMENTS TO CHILDREN. — A waterworks company maintained upon its grounds a reservoir of water, attractive to small boys, who, to its knowledge, and without objection on its part, were accustomed to resort there. *Held*, that if the company took no reasonable precautions to prevent accidents, and one of the children, without negligence on his part, fell in and was drowned, the representatives of the deceased might recover damages from the company for his death. *Price* v. *Atchison Water Co.*, 50 Pac. Rep. 450 (Kan.).

The court shows a tendency to take the untenable position that a failure to object to the entry of the boys on the land was equivalent to an express permission to them to come, but in general the opinion follows the line of argument in the turntable cases, laying down a special rule for infant trespassers. *Keffe* v. *Mil. & St. P. R. R. Co*, 21 Minn. 207. In the majority of cases where the cause of injury has been a reservoir of water, as above, an opposite conclusion has been reached, some of these decisions being in jurisdictions which allow recovery in the Turntable cases. *Peters* v. *Bowman*, 115 Cal. 345. There would seem, however, to be no distinction on principle between the two classes of cases. In the principal case the deceased had beeen repeatedly warned of the danger, and was apparently of such an age as to understand that it was wrong for him to go on the defendant's land; this would place him in the position of an adult trespasser and would justify a different result.

TORTS — LIBEL — PRIVILEGE. — In an action of libel, an affidavit made in the course of a former judicial proceeding was held only conditionally and not absolutely privileged. *Sommers* v. *Christiano*, 47 N. Y. Supp. 115.

It appears that the affidavit was material and relevant to the issue in the suit in which it was made. According to the great weight of authority, not even express malice will render such a statement actionable. *Garr* v. *Selden*, 4 N. Y. 94. Nevertheless, the proposition of the principal case has met with the approval of some courts. *Masterson* v. *Brown*, 72 Fed. Rep. 136 (criticised in 10 HARVARD LAW REVIEW, 134). Cf. Bishop on Non-Contract Law, § 298. Indeed, this doctrine would derive considerable support from *White* v. *Carroll*, 42 N. Y. 161, if that case had not been overruled, or at least explained, in *Marsh* v. *Ellesworth*, 50 N. Y. 309. This latter decision, which would be binding upon the lower New York courts, was not cited in the case under review.

TORTS — NEGLIGENCE. — The defendant's workmen were allowed to take refuse timber on a train which carried them home from their day's work. They had a regular habit of throwing this timber from the train while in motion. A piece thus thrown struck and injured the plaintiff, a traveller on the highway. At the trial, a verdict was ordered for the defendant. *Held*, the question of the defendant's negligence should have been left to the jury. *Fletcher* v. *Baltimore & P. Ry. Co.*, 18 Sup. Ct. Rep. 35 (D. C.).

The defendant was not liable for the negligence of its servant on grounds of agency, because the act causing the injury was not within the scope of the servant's employment. Mechem, Agency, § 734. But the court held this was not the proper test of the defendant's liability, and its reasoning seems sound. The defendant owed the duty of using reasonable diligence to see that persons on the highway were not injured by negligent or dangerous acts done on its train. Knowledge of and acquiescence in habitual acts which were negligent and dangerous, and which the defendant might have stopped, were evidence of a breach of this duty. Therefore the question should have been left to the jury. *Snow* v. *Fitchburg R. R. Co.*, 136 Mass. 552.

TRUSTS — CONSTRUCTIVE TRUST — STATUTE OF LIMITATIONS. — A trustee in violation of his express trust conveyed the *res* to S, who had knowledge of the objection of N, one of the *cestuis*. S afterwards always recognized the interests of all the *cestuis*. *Held*, that immediately upon the conveyance the Statute of Limitations began to run in favor of S as against N, and that the recognition by S of the rights of N, not being in writing, could not change his position to that of an express trustee. *Nouges* v. *Newlands*, 50 Pac. Rep. 386 (Cal.).

The court correctly holds S to be an implied or constructive trustee, but on the authority of *Hecht* v. *Slaney*, 72 Cal. 363, declares that the Statute of Limitations runs in favor of a constructive trustee although he has not repudiated the trust. In case of an express trust the Statute does not begin to run until there has been a repudiation of the trust to the knowledge of the *cestui*. It then runs on the theory that the trustee holds by adverse possession, which of course cannot exist so long as the rights of the *cestui* are recognized. Perry on Trusts, § 864. There is in this respect no difference between an express and an implied trust; they differ only in the mode of their creation. The admissions of the trustee in the principal case should have been a bar to the Statute. The court erred in considering that the recognition of the *cestui's* rights had no more force than a parol declaration of a new and express trust which was void because not in writing. The case cited was furthermore no authority, because there were no admissions by the trustee. *Doe* v. *Jewell*, 18 N. H. 240, is directly in point and *contra*.

WILLS — CONSTRUCTION — DETERMINATION OF CLASSES. — The testator devised a fee to A, who was the sole heir presumptive when the will was made. In case A should die without issue surviving, there was an executory devise over to the persons who should be the testator's heirs. A survived the testator and died without issue. *Held*, that the executory devisees were those who would have been the testator's heirs if he had died when A died. *Welch* v. *Brimmer*, 47 N. E. Rep. 699 (Mass.).

The decision is sound. It is a reasonable assumption that the testator knew that A would be his sole heir. The executory devise then would be rendered meaningless if, according to the general rule, the class of heirs should be determined at the testator's death, for A would be deprived of the property merely that he might get it back as executory devisee. The devise over shows a deliberate intention to exclude A if he should die without issue, and to give effect to this intention the class must be determined at A's death. The case differs from those cases where a remainder is given to the heirs after a life estate to the sole heir presumptive, for probably in such cases the testator, having made all the provisions for particular individuals that he desires, and finding that there is still something left, gives it to the heirs with no definite intention except to complete the disposition of the property. In such cases the word "heirs" should be given its ordinary meaning, and the class should be determined at the testator's death. The authorities are well collected in the principal case.